No. 86-612

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

On Appeal from the Supreme Court of Montana

# MOTION TO DISMISS

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# TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Contents ..... | i |
| Table of Authorities ..... | ii |
| Statement ..... | 2 |
| Argument ..... | 5 |
| I. The Appellants Failed to Timely and Properly Raise or Litigate Federal Constitutional Issues in the Montana Courts ..... | 5 |
| II. No Case or Controversy Exists Because Prudential's Voluntary Payment of the State Court Judgment Renders this Appeal Moot .... | 14 |
| Conclusion ..... | 15 |
| Appendix ..... | App. 1 |

# TABLE OF AUTHORITIES


| | Page |
|---|---|
| Cases: | |
| Aetna v. Lavoie, ____ U.S. ____, 106 S.Ct. 1580 (1986) ..... | 12, 13 |
| Amalgamated Ass'n of Street Employees Div. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416 (1951) ..... | 15 |
| Bailey v. Anderson, 326 U.S. 203 (1945) ..... | 11 |
| Beck v. Washington, 369 U.S. 541 (1962) ..... | 9 |
| Bowie v. Scott, 233 U.S. 657 (1914) ..... | 8 |
| Bradbrook v. Billings, 174 Mont. 27, 568 P.2d 527 (1977) ..... | 9 |
| DeFunis v. Odegaard, 416 U.S. 312 (1974) ..... | 15 |
| Dodd v. City of East Helena, 180 Mont. 518, 591 P.2d 241 (1979) ..... | 6 |
| Femling v. Montana State University, ____ Mont. ____, 713 P.2d 996 (1986) ... | 6 |

TABLE OF AUTHORITIES
(continued)


| | Page |
|---|---|
| Cases Continued: | |
| Flanigan v. Prudential, ____ Mont. ____, 720 P.2d 257 (1986) ..... | 6, 7, 9 |
| Fuller v. Oregon, 417 U.S. 40 (1974) ..... | 11 |
| Gallatin Trust and Savings Bank v. Henke, 154 Mont. 170, 461 P.2d 448 (1969) .... | 14 |
| Gilbert v. Gilbert, 166 Mont. 312, 533 P.2d 1079 (1975) ... | 9 |
| Heitmuller v. Stokes, 256 U.S. 359 (1921) ..... | 14 |
| Johnson v. Doran, 167 Mont. 486, 540 P.2d 306 (1975) ..... | 6 |
| McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) ..... | 10 |
| Memphis Natural Gas Company v. Beeler, 315 U.S. 649 (1941) ..... | 10 |
| Mills v. Green, 159 U.S. 651 (1895) ..... | 15 |

TABLE OF AUTHORITIES
(continued)

Page

Cases Continued:

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291 (1903) ..... 11

Prudential Federal Savings & Loan Assn., et al. v. Flanigan, ____ U.S. ____, 107 S.Ct. 38 ..... 3

Radio Station WOW v. Johnson, Inc., 326 U.S. 120 (1945) ... 3, 11

Rawson v. Sears Roebuck & Co., 615 F.Supp. 1546 (D. C. Colo. 1985), appeal docketed, No. 85-1223, argued Sept. 9, 1986 (10th Cir. 1986) ..... 13

Stembridge v. Georgia, 343 U.S. 541 (1951) ..... 11

Rules:

Rule 34, Mont. R. App. Civ. Pro. . 6

Rule 38, Mont. R. App. Civ. Pro. . 9

Rule 16(1)(b), Sup. Ct. R. ..... 1

TABLE OF AUTHORITIES
(continued)

Page

Constitution:

Montana Constitution ..... 8

Miscellaneous:

Feature Article, Aetna Life Insurance Co. v. Lavoie: Does Bad Faith Law Raise Questions of Constitutional Dimension?, Insurance Litigation Reporter 2 (Oct. 1985-Feb. 1986) ..... 12



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v.

MILDRED FLANIGAN,

Appellee.

On Appeal from the Supreme Court of Montana

# MOTION TO DISMISS

Appellee moves the Court, pursuant to Rule 16(1)(b), Sup. Ct. R., to dismiss Appellants' appeal, on the grounds that (i) Appellants failed to timely or properly raise a federal constitutional issue in

the state courts below and (ii) because there is no present case or controversy to be decided by this Court by virtue of Appellants' voluntary payment of the monetary judgment from which this appeal is taken.

———————o———————

## STATEMENT

On September 25, 1986, (then) Justice Rehnquist denied Appellants' application for a writ of injunction that would have undone the voluntary payment by Appellants (hereafter "Prudential") of the punitive damages portion of the judgment which was affirmed below. Justice Rehnquist's in-chambers opinion denying the application was not grounded on Prudential's failure to meet the standards for such an injunction. Rather, it went to the heart of this Court's jurisdiction over any aspect of the appeal:

> The constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the petitioners filed for rehearing. The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation. (Citations omitted.) Under these circumstances, the claims presented by the petitioners are not properly before me. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." Radio Station WOW v. Johnson, Inc., 326 U.S. 120, 128 (1945).

Denied.

Prudential Federal Savings & Loan Assn., et al. v. Flanigan, ____ U.S. ____, 107 S.Ct. 38 (Rehnquist, Circuit Justice, Sept. 25, 1986). Appendix (hereafter "App.") 1. Yet, Prudential persists in burdening this Court with another request to accept jurisdiction over this appeal.

At no time did Prudential raise a federal issue below, either in its pleadings, briefs, or arguments in the state district court, or in its three briefs filed on appeal to the Montana Supreme Court, or during oral argument to the Montana Supreme Court. The federal issues were raised for the first time in a Petition for Rehearing to that court.

Moreover, while the case was pending there, Prudential entered into an Escrow Agreement which was substituted, at Prudential's request, for the required surety bond pending appeal. App. 2. That agreement provided, inter alia, that in the event the judgment was affirmed, Flanigan had "the right to immediately demand and receive after remittitur the delivery of the [escrowed] securities" up to the amount of the final judgment. App. at 5 (emphasis added). The agreement also

incorporated an Assignment by which Prudential agreed that if the state district court judgment was affirmed "on appeal by the Montana Supreme Court," Prudential thereby assigned and transferred to Flanigan the securities held in escrow. App. at 13 (emphasis added).

Following denial of the Petition for Rehearing, without comment, by the Montana Supreme Court, Prudential voluntarily paid the entire amount of the judgment, interest, and costs, pursuant to the terms of the Escrow Agreement. As a result, Flanigan filed a Satisfaction of Judgment in the state district court.

———o———

## ARGUMENT

### I. THE APPELLANTS FAILED TO TIMELY AND PROPERLY RAISE OR LITIGATE FEDERAL CONSTITUTIONAL ISSUES IN THE MONTANA COURTS.

It is well established by judicial decisions in Montana, as in most juris-

dictions, that "a constitutional issue is waived if not presented at the earliest opportunity." Dodd v. City of East Helena, 180 Mont. 518, 591 P.2d 241, 244 (1979); Johnson v. Doran, 167 Mont. 486, 540 P.2d 306, 311 (1975). Notwithstanding this firm rule, Prudential first raised federal constitutional issues in its Petition for Rehearing after the Montana Supreme Court had affirmed the trial court. The Montana Supreme Court's decision was predicated strictly upon state law issues. 1/ Under Montana law, a petition for rehearing may not be filed to present, for the first time, constitutional issues not previously raised. Rule 34, Mont. R. App. Civ. Pro.; Femling v. Montana State University, ____ Mont. ____, 713 P.2d 996 (1986).

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1/ Flanigan v. Prudential, ____ Mont. ____, 720 P.2d 257 (1986).

Furthermore, Prudential's repeated assertion that it raised the Eighth Amendment "excessive fines" issue in its Petition for Rehearing is a gross misrepresentation. That issue, which now appears to be the focal point of Prudential's appeal, was not asserted or briefed at all before the Montana Supreme Court, even in the Petition for Rehearing. See Juris. Statement, App. 44-63. The Eighth Amendment issue has been raised for the first time here.2/

Prudential argues that it "implicitly raised" a "due process" issue in the Montana Supreme Court. In its brief there,

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2/ Prudential also failed to challenge, at any time, the alleged "excessiveness" of the jury award on the traditional grounds allowed by Montana statute. Flanigan v. Prudential, ____ Mont. ____, 720 P.2d 257, 265 (1986).

however, Prudential made absolutely no mention of any federal or state constitutional provision. Id. at 32-43. Indeed, even signal words, such as "due process," "unfair," "fundamental fairness," or similar language that would suggest a federal constitutional "due process" issue, are conspicuously absent. Even if the words "due process" had appeared, this Court has held that mere reference to a denial of "due process of law," which could refer to either a federal or state constitutional provision, will be assumed to refer to the due process clause, if there is one (as there is in Montana) of the state constitution. See Mont. Const. art. II, § 17 (1972). In such an instance this Court will not assume jurisdiction. Bowie v. Scott, 233 U.S. 657, 665 (1914).

Prudential's "notice" argument was raised and responded to by the Montana

Supreme Court, only within the context of state statutes (punitive damages and employment at-will), not as to any state or federal constitutional provisions. Flanigan, ____ Mont. at ____, 720 P.2d at 265. Mere generalizations that might pertain to a potential federal issue are not sufficient to invoke the jurisdiction of this Court. Beck v. Washington, 369 U.S. 541 (1962).3/

Prudential offered not one shred of evidence in the lower courts to support

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3/ Even if, arguendo, a federal issue was "implicitly" raised challenging the validity of a state statute, Prudential failed to comply with Rule 38, Mont. R. App. Civ. Pro., requiring the State's Attorney General to be given notice of a constitutional challenge to a state statute. Because of this critical procedural omission, the constitutional issue, even if so raised, is yet another reason why it could not, and would not, be considered by the Montana courts. Bradbrook v. Billings, 174 Mont. 27, 568 P.2d 527 (1977); Gilbert v. Gilbert, 166 Mont. 312, 533 P.2d 1079 (1975).

the "notice" argument which it belatedly attempts to expand and present as a federal issue. There has been no ruling or comment in the lower courts, concerning a "notice" claim within the context of a federal issue, which would justify this Court's review of a state punitive damages statute that has existed since 1895. See, McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435 (1940).

Prudential totally fails to meet its burden of affirmatively showing that it properly invoked the jurisdiction of this Court. Memphis Natural Gas Company v. Beeler, 315 U.S. 649, 651 (1941). It is well established that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts.

Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974). Likewise, this Court has said it will decline to exercise jurisdiction when, as here, the highest state court was completely silent on the federal question. Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309 (1903). A federal issue comes too late for consideration by this Court when first raised in a petition for rehearing and when, as here, state law requires that constitutional issues be raised prior to such a petition, and the petition has been denied without comment or opinion. Stembridge v. Georgia, 343 U.S. 541, 547 (1951); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Prudential's claim that it "implicitly" preserved federal constitutional issues in the Montana courts is belied by its own agreement that this litigation,

involving solely traditional state tort and evidentiary issues, would conclude with payment of the judgment following affirmance by the Montana Supreme Court. This appeal is pursued simply as an afterthought because this Court indicated in Aetna v. Lavoie, ____ U.S. ____, 106 S.Ct. 1580, 1589 (1986), that the issues Prudential failed to timely raise below in this case might be considered "in an appropriate case."

The Aetna decision has been widely publicized among the tort defense bar.[4/] There is a plethora of tort cases involving punitive damages presently pending in both state and federal courts. In those

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4/ See, e.g., Feature Article, Aetna Life Insurance Co. v. Lavoie: Does Bad Faith Law Raise Questions of Constitutional Dimension?, Insurance Litigation Reporter 2 (Oct. 1985-Feb. 1986).

cases, Eighth and Fourteenth Amendment issues, and other federal issues, are being timely and properly raised in the pleadings and litigated throughout the trial and appellate levels. This Court, therefore, will not lack the opportunity, if it chooses, to review and pass upon those constitutional issues, mentioned in Aetna, which have been properly and timely raised, litigated and passed upon below.[5/] Because Prudential failed to timely or properly raise and litigate these issues, they were not addressed in the lower courts. Therefore, this case is far from

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5/ See, e.g., Rawson v. Sears Roebuck & Co., 615 F.Supp. 1546 (D. C. Colo. 1985), appeal docketed, No. 85-1223, argued Sept. 9, 1986 (10th Cir. 1986). ($10.0 million punitive damages and $5.8 million compensatory damages awarded for wrongful termination of employment, challenged, inter alia, on Eighth Amendment grounds.)

being the "appropriate case" for giving consideration to those issues.

## II. NO CASE OR CONTROVERSY EXISTS BECAUSE PRUDENTIAL'S VOLUNTARY PAYMENT OF THE STATE COURT JUDGMENT RENDERS THIS APPEAL MOOT.

In Montana, a litigant who voluntarily pays and satisfies a judgment is precluded from taking a further appeal. Gallatin Trust and Savings Bank v. Henke, 154 Mont. 170, 461 P.2d 448 (1969). Therefore, even if the Escrow Agreement, which provided for payment of the judgment after affirmance "by the Montana Supreme Court," were construed to allow Prudential the right to a further appeal, its voluntary satisfaction of Flanigan's judgment following the decision of the Montana Supreme Court rendered this case moot. See, Heitmuller v. Stokes, 256 U.S. 359, 362 (1921). This Court will not render advisory opinions when a controversy has become moot by virtue of intervening fac-

tual circumstances. DeFunis v. Odegaard, 416 U.S. 312 (1974). An appeal will be dismissed as moot if events occur which prevent the appellate court from granting any effective relief. Mills v. Green, 159 U.S. 651 (1895). A case that has been rendered moot will not be decided even if it presents an issue of "public importance." Amalgamated Ass'n of Street Employees Div. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416 (1951).

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## CONCLUSION

This Court is urged to adhere to its long-standing precedent establishing the firm rule, as reiterated and reaffirmed by Chief Justice Rehnquist in his in-chambers decision in this case, that constitutional issues first presented to the highest state court on a petition for rehearing,

and not addressed by that court, come too late for consideration by this Court. For that reason, as well as for the reason that this case is now moot, the Appellee moves that this appeal be dismissed.

DATED this 10th day of November, 1986.

Respectfully submitted,

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# APPENDIX

# SUPREME COURT OF THE UNITED STATES

No. A-229

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL. *v.* MILDRED FLANIGAN

ON APPLICATION FOR INJUNCTION

[September 25, 1986]

JUSTICE REHNQUIST, Circuit Justice.

The application for a writ of injunction pending appeal is denied. The constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the petitioners filed for rehearing. The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation. See *Femling* v. *Montana State University*, —— Mont. ——, 713 P. 2d 996, 999 (1986); *Dodd* v. *East Helena*, 180 Mont. 518, 523, 591 P. 2d 241, 244 (1979). Under these circumstances, the claims presented by the petitioners are not properly before me. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." *Radio Station WOW* v. *Johnson, Inc.*, 326 U. S. 120, 128 (1945).

*Denied.*

BEST AVAILABLE COPY

ESCROW AGREEMENT

THIS AGREEMENT, made and executed this 28th day of June, 1985, by and between PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal corporation, and FRED OGOLIN, (hereinafter called PFS), MILDRED FLANIGAN, of Butte, Montana, (hereinafter called Flanigan), and FIRST BANK BUTTE, Butte, Montana, a national banking corporation, (hereinafter called First Bank),

W I T N E S S E T H:

WHEREAS, there is pending in the Second Judicial District Court of the State of Montana in Cause No. 83-C-174 an action by Flanigan as Plaintiff against PFS, and

WHEREAS, Flanigan has recovered judgment against PFS in the sum of $1,494,170.00 entered on April 29, 1985, and

WHEREAS, on May 2, 1985, PFS filed a Notice of Appeal of said judgment to the

Montana Supreme Court and said appeal is now pending, and

WHEREAS, on May 22, 1985, the District Court entered its order directing the PFS (including Ogolin) to post a supersedeas bond with the Court in the sum of $1,645,000.00, a copy of which order is attached hereto, and

WHEREAS, PFS and Flanigan have agreed that PFS may satisfy the bond conditions of the order of May 22, 1985, by placing with First Bank as escrow holder the securities listed in Schedule "A" attached hereto, upon the terms and conditions of this agreement,

NOW, THEREFORE, it is agreed between the parties as follows:

1. PFS hereby deposits with First Bank as escrow agent securities listed in Schedule "A" attached hereto;

2. Flanigan agrees said deposit satisfies the conditions of the order of the District Court of May 22, 1985, attached hereto;

3. First Bank shall retain said securities as escrow agent pending appeal of Cause No. 83-C-174 and final determination thereof;

4. PFS has deposited with First Bank a separate assignment of its right, title and interest in said securities, conditioned nevertheless, on affirmance by the Montana Supreme Court of Flanigan's judgment against PFS in Cause 83-C-174, and if said judgment is reversed, the assignment shall be void;

5. The escrow agent First Bank shall hold said Securities without liability to First Bank except for the faithful performance of its duties as escrow agent;

6. PFS shall at all times pending appeal be the owner of said securities and entitled to all earnings on said securities. At the maturity of said securities, and in the event the appeal of Cause 83-C-174 is not final, PFS may upon notice by motion to the court and court's approval, replace said securities with other suitable securities;

7. In the event the judgment in Cause No. 83-C-174 is affirmed upon appeal, Flanigan shall have the right to immediately demand and receive after remittitur the delivery of the securities by First Bank up to the amount of final judgment and in the further event said judgment in Cause No. 83-C-174 is reversed and vacated, PFS shall have the right to immediately demand and receive upon remittitur from First Bank the securities listed in Schedule "A";

8. All notices of demand to First Bank by either PFS or Flanigan shall be in writing and acknowledged by First Bank;

9. Except for the faithful performance of its duties as escrow holder, First Bank (A) need not inquire into and shall not be responsible for the sufficiency of the securities, nor have any duty to investigate or inquire into the sufficiency or validity of the securities listed in Schedule "A"; (B) shall not be obligated to take any action which, in the opinion of its counsel, may unlawfully or unduly expose First Bank to the risk of liability as to said securities; (C) shall not be answerable or accountable for any act or failure to act under any circumstances with respect to the sufficiency or validity of the securities listed in Schedule "A"; (D) shall be under no duty or responsibility to act with regard to

any matter in Cause No. 83-C-174, or the appeal of said cause; (E) shall be entitled to be reimbursed for any costs or expenses arising out of this escrow and any dispute thereof, including reasonable attorney fees and costs; (F) shall not be liable or responsible for any transfer or assignment of the rights of any party to this agreement; and (G) shall be liable as a depository only and not be obligated to take any action required of any other party to this agreement.

10. PFS shall pay as court costs all escrow fees due under this agreement.

11. Time is of the essence of this agreement. This agreement constitutes the full agreement between the parties and no other agreement whether oral or written shall be deemed to exist or be binding upon the parties hereto.

12. This agreement shall not be assigned by PFS or Flanigan, without express written consent of the other party.

IN WITNESS WHEREOF, the parties have hereunto executed this agreement the day and year first above written.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION and FRED OGOLIN

By /s/ Fred Ogolin

/s/ Mildred M. Flanigan
MILDRED FLANIGAN

FIRST BANK BUTTE

By /s/ Don Tatge, V.P.

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT

Of the State of Montana

In and for the County of Silver Bow

---

MILDRED FLANIGAN,

Plaintiff,

-vs- No. 83-C-174

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered banking corporation, and FRED OGOLIN,

Defendants.

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ORDER

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The Plaintiff's Exception to Sufficiency of Surety having come on regularly for hearing before the Court on the 10th day of May, 1985, the Plaintiff being represented by Donald C. Robinson, Esq., and the Defendants by Deirdre Caughlan, Esq. The parties having presented arguments on the issue presented by the Plaintiff's

objection, and the Court being fully advised in the premises, finds that the Plaintiff's objection to the sufficiency of the surety is well taken; the Court finds that in the event the Plaintiffs are successful after disposition of the appeal the total judgment, including interest, and costs, could be in the approximate amount of One Million Six Hundred Forty-five Thousand ($1,645,000.00) Dollars; it further appears that the judgment is not otherwise secured and the Court concludes that under Rule 7, Montana Rules of Appellate Civil Procedure, it is required that the supersedeas bond in this case must be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs, interest, and damages for delay the Court in its discretion finds and concludes that only a surety body will provide the proper and

adequate security to the Plaintiff herein, now, therefore, it is hereby

ORDERED, AND THIS DOES ORDER, that by no later than the 31st day of May, 1985, the Defendants will post a supersedeas bond with the Court, in the amount of One Million Six Hundred Forty-five Thousand ($1,645,000.00) Dollars, as a condition to satisfaction of Plaintiff's objections under the Montana Rules of Appellate Civil Procedure.

DATED this 22nd day of May, 1985.

/s/ Mark P. Sullivan
District Judge

SCHEDULE "A"

The following securities are held by First Bank Butte as Escrow Agent for Prudential Federal Savings & Loan Association and Mildred Flanigan:

U.S. Treasury Notes totaling $2,000,000 paying 10.50% interest and due to mature November 30, 1985. These Treasury Notes are held in First Bank Butte's general account at Federal Reserve Bank, Minneapolis, Minnesota.

Demand for withdrawal by either of the two mentioned parties must be made to First Bank Butte before 9:30 a.m. on the day transfer of funds is required and must be made in accordance with their escrow agreement. Disbursement shall be a First Bank Butte money order or cashiers check payable to Mildred Flanigan or, if demand is made by Prudential Federal Savings & Loan Association, a reverse transaction shall be made to their account at the Federal Reserve Bank, New York.

ASSIGNMENT

FOR VALUABLE CONSIDERATION, and upon the express condition that the judgment in Cause No. 83-C-174, filed in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, entitled "MILDRED FLANIGAN, Plaintiff, vs. PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN, Defendants," is affirmed, in whole or in part, on appeal by the Montana Supreme Court, Prudential Federal Savings and Loan Association does hereby assign, set over and transfer to Mildred Flanigan, all securities to the amount of final judgment, including interest at the rate of ten (10%) percent per annum and costs, held in escrow by the First Bank Butte under Escrow Agreement dated June 28, 1985, to which reference is hereby made, provided,

nevertheless, this assignment is void in the event the above-described judgment is reversed by the Montana Supreme Court and by virtue thereof the Plaintiff, Mildred Flanigan, is entitled to no part thereof.

DATED this 28th day of June, 1985.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation

By /s/ Fred Ogolin
Vice President